

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST WAYNE BEGLEY,

Defendant-Appellant.

UNPUBLISHED

January 25, 2005

No. 251046

Wayne Circuit Court

LC No. 03-003359-01

Before: Gage, P.J., and Meter and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of aggravated stalking, MCL 750.411i(2)(c), and two counts of conspiracy to commit aggravated stalking, MCL 750.157a,¹ but acquitted of discharging a firearm at an occupied dwelling, MCL 750.234b. He was sentenced to four concurrent prison terms of forty to sixty months each.² He appeals as of right. We affirm.

Defendant argues that the trial court erred in deferring consideration of his motion for a directed verdict until after the prosecutor's closing argument.

As noted by defendant, MCR 6.419(A) states that a "court may not reserve decision on the defendant's motion" for a directed verdict of acquittal. Thus, the trial court violated this rule when it deferred its decision on defendant's motion for a directed verdict. However, a preserved nonconstitutional error is presumed to be harmless unless the defendant can demonstrate that it resulted in a "miscarriage of justice;" i.e., that in light of the strength of the untainted evidence, it

¹ The jury was unable to reach a verdict on additional charges of arson of a dwelling house, MCL 750.72, conspiracy to commit arson of a dwelling house, MCL 750.157a, assault with intent to commit murder, MCL 750.83, and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant subsequently pleaded no contest to a reduced charge of attempted arson, MCL 750.92, in exchange for the dismissal of the remaining charges.

² The trial court subsequently partially granted defendant's motion for judgment notwithstanding the verdict, dismissing one of the conspiracy convictions and reducing the other to conspiracy to commit stalking, a misdemeanor. See MCL 750.411h(2)(a). That decision is not at issue in this appeal.

is “more probable than not that a different outcome would have resulted without the error.” *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). “[P]ostponing a hearing on a defendant’s motion for directed verdict is harmless error where the prosecutor presented sufficient evidence to convict the defendant at the close of [her] proofs.” *People v Vincent*, 455 Mich 110, 115 n 1; 565 NW2d 629 (1997), citing *People v Higgs*, 209 Mich App 306, 307; 530 NW2d 182 (1995).

In this case, there was ample evidence that defendant engaged in, and conspired with others to engage in, a wilful course of conduct involving repeated and continued harassment of his estranged wife Tracie Begley that would cause a reasonable person to feel terrorized, frightened, intimidated and harassed, and that caused Begley to feel terrorized and frightened. MCL 750.411i(1)(e). As discussed *infra*, there was also sufficient evidence to establish defendant’s guilt of aggravated stalking of Brian Simpson.³ Although the trial court erred in postponing the hearing on defendant’s motion for a directed verdict, we conclude that the error was harmless, and defendant has not presented any persuasive argument to the contrary.

Defendant next argues that the trial court erred in denying his motion to exclude the testimony of his private investigator. We disagree. Questions of statutory interpretation are reviewed de novo. *In re Request for Investigative Subpoena*, 256 Mich App 39, 44; 662 NW2d 69 (2003).

This Court has found that MCL 338.840 establishes a legal privilege that “protects first, ‘communications . . . furnished by . . . [the] client to the licensee,’ and second, ‘information secured [by a private investigator] in connection with an assignment for a client’” *Id.* at 46-47, quoting MCL 338.840(2). “[B]road protection is to be accorded the private detective-client relationship,” analogous to the protections afforded attorney-client communications. *Ravary v Reed*, 163 Mich App 447, 451-452; 415 NW2d 240 (1987).

Here, the primary import of the private investigator’s testimony did not concern anything that defendant told him or information that he gathered for defendant. Thus, for the most part, his testimony was not covered by the investigator-client privilege. To the extent that some of the investigator’s testimony could be considered privileged, it was cumulative of defendant’s own admissions to other witnesses. Therefore, considered in light of the strength of the untainted evidence, it is not more probable than not that any error arising from those portions of the investigator’s testimony affected the outcome of the case. *Lukity, supra*. Accordingly, any error was harmless.

Defendant also argues that there was insufficient evidence to convict him of aggravated stalking of Brian Simpson. We disagree.

³ There was also sufficient evidence to support a conspiracy conviction with regard to the stalking of Brian Simpson. We note that the court’s post-trial dismissal of one of the conspiracy convictions and its reduction of the other to a misdemeanor were based on legal principles pertaining to co-conspirators and were not based on insufficient evidence. Contrary to defendant’s suggestion on appeal, these post-trial rulings do not impact our decision today.

The sufficiency of the evidence is to be evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221; 380 NW2d 11 (1985). Resolving credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a reasonable jury to find beyond a reasonable doubt that defendant engaged in a wilful course of conduct involving repeated and continued harassment of Brian Simpson that would cause a reasonable person to feel terrorized, frightened, intimidated and harassed, and that actually caused Simpson to feel this way. MCL 750.411i(1)(e). The evidence indicated that defendant repeatedly made threatening telephone calls to Simpson and was involved in breaking windows in Simpson's vehicle, filling his gas tank with sugar, throwing a crescent wrench through his front window, and setting his house on fire. The evidence was sufficient to support defendant's conviction of aggravated stalking toward Simpson.

Defendant also argues that the trial court erred in exceeding the sentencing guidelines when sentencing him for the aggravated stalking convictions. We disagree.

The application and interpretation of the legislative sentencing guidelines is a question of law to be reviewed de novo on appeal. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). "A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). In reviewing a trial court's determination that substantial and compelling reasons exist to justify a departure from the guidelines, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion." *Babcock*, *supra* at 265. In the context of the sentencing guidelines, "[a]n abuse of discretion occurs . . . when the trial court chooses an outcome falling outside th[e] principled range of outcomes." *Id.* at 269.

The trial court's scoring of the guidelines for defendant's aggravated stalking convictions placed defendant in prior record level "C" and offense variable level "VI" for class E offenses against the person, resulting in a minimum sentence range of twelve to twenty-four months. See MCL 777.66. The trial court departed from this range and imposed a minimum sentence of forty months. The court found that the guidelines did not contemplate conduct as extreme as that engaged in by defendant and noted that defendant's actions constituted "terrorism," making the recommended range inadequate. A court properly may depart from the guidelines if it determines from facts contained in the record that an offense or offender characteristic that is already reflected in the guidelines scoring has been given inadequate or disproportionate weight. MCL 769.34(3)(b).

Defendant's convictions arose from a course of conduct that occurred over several months, during which time defendant continually and repeatedly terrorized the two victims, engaged in increasingly violent and destructive behavior, which included the discharge of a firearm at the victims by an accomplice, and recruited relatives to assist him in terrorizing the victims. We agree with the trial court that the extreme nature of defendant's conduct is an objective and verifiable factor that "keenly" or "irresistibly" grabs our attention; is "of

considerable worth” in deciding the length of defendant’s sentence and makes this an exceptional case. *Babcock, supra* at 257-258; *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). We also conclude that defendant’s conduct justified the *particular* departure imposed in this case. *Babcock, supra* at 259; *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). Defendant’s sentences are proportionate to the seriousness of his conduct, despite his lack of a prior criminal record. *Babcock, supra* at 262, 264. The trial court did not err in exceeding the minimum sentence range of the guidelines.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood